

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

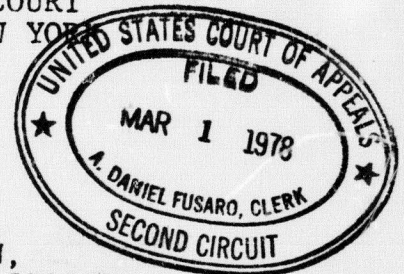
WALTER JOHN KUBIT,

Defendant-Appellant.
-----X

Docket No. 77-1495

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the record of this case presents any non-frivolous issues to be raised on appeal for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce) rendered on December 14, 1977, after a jury trial, convicting appellant Walter John Kubit of forging (Counts 6-9) and uttering (Counts 10-13) four United States Treasury checks, all in violation of 18 U.S.C. §495. Appellant was sentenced to a term of imprisonment of one year on each count, the terms to run concurrently.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Superseding Indictment*

The superseding indictment, filed on September 19, 1977, charged appellant Kubit with five counts of making false statements to the Veterans' Administration with respect to the bene-

*This indictment, S77 Cr. 508, is reproduced as "B" to the separate appendix to appellant's brief. This indictment superseded a prior indictment, 77 Cr. 508, filed on July 5, 1977, which alleged 48 counts of forging and uttering Treasury checks and stealing those checks from the mails. On November 1, 1977, a nolle prosequi was granted as to indictment 77 Cr. 508.

fit claims of two veterans, Herman Leibler and Thomas J. O'Brien (Counts 1-5) (18 U.S.C. §1001), four counts of forging O'Brien's endorsement on Treasury checks (Counts 6-9) (18 U.S.C. §495), and four counts of uttering those checks (Counts 10-13) (18 U.S.C. §495).

B. The Government's Case

Herman Leibler, a 75 year old veteran of the United States Army, testified that he met appellant 15 or 16 years ago (153, 158).^{*} After a discussion in the summer of 1970 about veterans' benefits, appellant told Leibler that appellant would be able to help Leibler obtain such benefits (159). Accordingly, an application form, dated September 30, 1970, and signed by Leibler, was filed with the Veterans' Administration (160-161, 225). The application bore appellant's address, 334 West 88th Street, New York City 10024. Leibler testified that he did not authorize appellant to use that address (160) or to receive mail for him (170-171). According to Leibler, five or six months after the filing of the application, appellant indicated that the claim had been rejected (160-163, 227).

Albert Segal, an employee of the Veterans' Administration, testified that according to the records maintained by that agency, Leibler received a non-service disability pension

^{*}Numerals in parentheses refer to pages of the trial transcript. Numerals preceded by "GX" refer to numbers of the Government's exhibits in evidence, and numerals preceded by "DX" refer to the numbers of defense exhibits in evidence.

effective October 16, 1970, the checks for which were originally sent to the 88th Street address (57, 142).*

Leibler indicated that after his stroke in 1974, he decided to apply for benefits and, after filing an application, told appellant he had done so. According to Leibler, appellant became angry and stated that Leibler would have a check at the end of the month which Leibler, in fact, received (166-168, 237).

In the course of cross-examination and re-direct, Leibler referred to appellant as a "crook" (205), an "embezzler" (217), and a "schemer" (249), and stated that appellant was "good at [demanding money] when it comes to elderly people" (216). He also testified that he did not know when appellant "decided to commit his fraud" (221). Defense counsel's objections to these references were sustained, and they were stricken from the record (205, 216, 217, 221). Further, at the conclusion of Leibler's testimony, the district court told the jurors to disregard that portion of the testimony:

Ladies and gentlemen, there were several occasions when the witness, Mr. Leibler, used various characterizations like "fraud," "embezzler," "schemer," et cetera. Strike all of those references and I direct you to disregard them.

(251).

*Various documents (forms, letters, amended award letter, change of address instructions, record of checks sent) pertaining to the Leibler claim were admitted in evidence (GX 1A-N) (52-68).

Thomas J. O'Brien, another veteran of the United States Army, testified that he knew appellant for approximately six years; that in December 1972 they discussed the possibility of O'Brien's receiving veterans' benefits; and that as a result, O'Brien signed a blank application form to be submitted to the Veterans' Administration by appellant (254-258, 283, 289-290). O'Brien authorized appellant to submit the application bearing appellant's 88th Street address (259, 293) and to use that address for the processing of the claim (296). According to O'Brien, in the spring of 1973, appellant indicated that the Veterans' Administration needed additional information, which O'Brien failed to supply (259-262). However, O'Brien stated that on November 4, 1975, he discovered that the application for non-service connected benefits had been granted effective December 22, 1972.*

As part of the Government's case, 21 checks (GX3), which were in payment of the O'Brien claim and which were payable to Thomas J. O'Brien or Thomas J. O'Briem, were admitted in evidence. Four of these checks (GX3-A - 3-D)** were the subject

*Albert Segal indicated that the records of the Veterans' Administration corroborated this testimony (84, 126-127).

**Two of the checks (GX3-C, 3-D) were cashed at a Red Apple supermarket in Manhattan (25-27); a third (GX3-A) was cashed at the Moose Head Tavern (42), while a fourth was submitted as part payment of appellant's rent (389).

of Counts 6-13 of the indictment. O'Brien testified that he never authorized appellant to receive these checks or to endorse them (226-227).*

Agent James Lukash testified that appellant, inter alia, admitted signing Thomas J. O'Brien's name on the reverse of 21 checks (GX3), but indicated that the Thomas J. O'Brien to whom appellant referred was an elderly man who had lived with appellant but who had died in November 1975. Further, appellant indicated that the funeral had taken place at the William B. Cooke funeral home** and that some of the proceeds of the checks had been used to pay O'Brien's rent (322-323, 358).

On cross-examination, the agent was asked whether he had "ever verif[ied] that what [appellant] told you was his social security number on April 5th was in fact his social security number" (352). The agent answered in the following manner: "I believe I did, based on doing a criminal records check" (352). The trial attorney for appellant requested a mistrial because of the agent's answer, which the defense contended "suggests that there is a record" (352). The district court denied this

*By stipulation read to the jurors (GX4), it was agreed that the endorsements of the payees on the reverse of the 21 checks were written by appellant. In addition, various documents relevant to the O'Brien application, but which had not been seen or completed by O'Brien, were admitted in evidence (GX2C-F, 2J-L, 20) (262-268).

**A record maintained by the Cooke funeral home at 190th Street in the Bronx indicated that a Thomas J. O'Brien, who died on November 29, 1975, was not a veteran (344). This record was admitted in evidence.

request, finding that the answer did not indicate a criminal record:

I find the answer essentially not that prejudicial. It would no doubt be preferable if that type of answer was not given, but the answer is not damning. To do a check is a very different thing from saying somebody has a criminal record and I don't consider it that damaging.

(355).

Further, the district court offered to give a jury instruction on the question:

If you have some instruction that you want from me, put it together and hand it up to me in writing and I will consider it.

(353).*

C. The Defense Case

Appellant testified in his own behalf. He stated that he was a veteran of the United States Army and a current member of the Washington Heights Lodge of the Disabled Veterans' Association ("DAV"), holding an honorary rank of major (484-486, 575, 650). As part of his participation in the DAV, appellant helped 300-400 veterans apply for veterans' benefits (486-487, 575). Appellant stated that he never received anyone's benefits nor endorsed their checks without permission (487). He stated that he helped O'Brien with his application for veterans'

*Pearl Tytell, a handwriting expert, also testified as part of the Government's case (402-463).

benefits and filled out various forms on O'Brien's behalf at the latter's request (492-508, 567-568, 570-573, 576). The last correspondence appellant had with regard to the O'Brien claim was during the summer of 1973. Appellant testified that he never received an award for O'Brien because of O'Brien's disinterest, and that he abandoned his efforts (507-508, 577).

Appellant also testified that in the course of his duties managing the brownstone located at 334 West 88th Street, he rented a room to an elderly man named Thomas J. O'Brien, who was not the O'Brien whom he had helped with veterans' benefits; that this other O'Brien indicated that he received monthly veterans' pension checks;* and that O'Brien asked appellant to cash these checks, which appellant did (510-514, 578, 617) by endorsing O'Brien's name and then appellant's (514). Appellant then returned the proceeds to O'Brien, after deducting his rent (514). Appellant said that he cashed two checks at the Red Apple supermarket (515, 618) and a third (GX3) at the Moose Head Tavern (516). In January 1974, appellant moved to 45 Wadsworth Avenue in New York City after both he and O'Brien were evicted from the 88th Street building (517, 635). Since O'Brien "had no permanent address" (521), appellant agreed to receive his mail. Appellant stated that he would receive O'Brien's pension checks, cash them, and return the proceeds to O'Brien, usually on the first day of every month when O'Brien

*A check of VA benefits for a Thomas J. O'Brien born in 1898 came back negative (72).

visited appellant for that purpose (517-518, 520-521, 523, 581, 615, 617-619). In November 1975 appellant was told by an acquaintance that O'Brien had recently died and the checks stopped coming at that time (524, 525-526, 583). Appellant indicated that he believed that the checks were for the claim of the older O'Brien (573-574).

Further, appellant testified that he was good friends with Herman Leibler until his stroke in 1974 (529, 533); that appellant helped Leibler process the forms for veterans' benefits and, with Leibler's permission, used appellant's address for that purpose (533, 542, 545); and that the Leibler application was granted (538, 541). At Leibler's request, appellant received his checks (543, 551-552) and either cashed them or deposited them (542-543), returning the proceeds to Leibler (552).

James Collins, the owner of a cabaret named the Melody Lounge, testified that a man by the name of Tommy O'Brien, who was in his "late 50's, early 60's," frequented the lounge and once told Collins that appellant cashed O'Brien's checks (658-661).

D. The Government's Rebuttal

John Rodriguez, a national service officer for the Disabled American Veterans, testified that appellant was not a current member of that organization; that he had not paid dues since 1974; that his membership had been cancelled in February

1976; and that, in Rodriguez' experience, the organization did not recognize the honorary rank of major (672-673).

E. The Charge*

After instructing the jurors as to the elements of the forging counts (Counts 6-9), the district court told them that the fourth element -- that appellant "acted knowingly and willfully and for the purpose of obtaining a sum of money from the United States," is satisfied if the jurors

... find that the defendant was not given the checks by an older Thomas J. O'Brien or did not have such person's authority to endorse any such check or did not truly believe he had such authority. This element is not satisfied if you find that the defendant was given the checks by the older Thomas J. O'Brien and did have his authority to endorse the checks or that the defendant did truly believe he had such authority.

(788-789).

A similar instruction was given with respect to the uttering counts (792-793). Defense counsel for appellant objected to this instruction as a mischaracterization of the defense theory. In response, the district judge corrected the prior charge in the following manner:

Let me correct something I told you earlier. I told you that there were four elements that had to be proven beyond a reasonable doubt by the government with respect to

*The complete text of the charge is reproduced as "C" to the separate appendix to appellant's brief.

counts 6 through 9. I told you the meaning of the words knowingly and willfully. Then I told you that this element is satisfied if -- I am going to correct that portion of it. This element is satisfied if you find that the checks were not received by the defendant for an older Thomas J. O'Brien and the defendant did not have such older person's authority to endorse any such check or did not truly believe he had such authority.

This element is not satisfied if you find that the checks were received by the defendant for the older Thomas J. O'Brien and the defendant did have his authority to endorse the checks or the defendant did truly believe he had such authority. The same instruction, the same correction applies to counts 10 through 13.

(817).

After the rereading of testimony and the court's revised charge and deliberations over three days, appellant was found not guilty of Counts 1-5 and guilty of Counts 6-13.

F. The Post-Trial Motion for a New Trial

On November 15, 1977, appellant filed a motion for a new trial, arguing, inter alia, that the district court's charge on false exculpatory statements was incorrect; that the verdict was inconsistent; and that the discovery after trial that Herman Leibler had two convictions for grand larceny in 1946 and 1950 required a new trial.

STATEMENT OF POSSIBLE LEGAL ISSUES

I

During his testimony, one of the Government's witnesses, Herman Leibler, referred to appellant by various epithets, including "crook," "embezzler," and "schemer." While this testimony was improper, objections to these references were sustained, and the references were stricken from the record. Further, the district court specifically instructed the jurors to disregard that testimony. In any event, Leibler's objectionable testimony could not have prejudiced appellant, since the jury acquitted appellant of the charge to which Leibler's testimony referred.

II

During the cross-examination of Agent James Lukash, trial counsel for appellant asked whether the agent had verified appellant's social security number. After the agent responded that he had verified the number "based on doing a criminal records check" (352), defense counsel moved for a mistrial on the assumption that the agent's answer indicated that appellant had a criminal record. However, as the district court found, the record reflects only that the agent said he did a check for a criminal record, not that he discovered that appellant had previously been convicted of a crime.

III

In the course of his instructions to the jurors, Judge Pierce summarized the contentions of the Government and the defense and attempted to apply them to the specific elements of the crimes charged. In discussing appellant's theory of the case, the district judge misconstrued appellant's testimony that when appellant lived at the 88th Street address, he had been given the checks by O'Brien personally but at Wadsworth Avenue, he received the O'Brien checks in the mail.

However, after objection by defense counsel, Judge Pierce revised his instructions to accord with the defense theory. No objection was taken to this revised charge, which was read a second time at the jurors' request.

IV

In his post-trial motion, defense counsel for appellant argued that the district court's instruction on false exculpatory statements was incorrect; that the verdict was inconsistent; and that the discovery after trial of Herman Leibler's 1946 and 1950 convictions for grand larceny required a new trial.

A. False Exculpatory Statements

As to false exculpatory statements, the district court instructed the jurors in the following way:

There has been testimony that the defendant made a number of statements tending to show his innocence at the time of his arrest in this case. There has also been evidence presented which if believed by you, you may find renders the defendant's statements to be false. I charge you that exculpatory statements, if shown to be false, may be considered by you as circumstantial evidence of guilt consciousness.

(772).

This instruction was in accord with this Court's recent discussion of the question in United States v. DiStefano, 555 F.2d 1094, 1104 (2d Cir. 1977).

B. Inconsistent Verdicts

Appellant was charged with filing false documents with the Veterans' Administration (18 U.S.C. §1001), forging O'Brien's endorsements on veterans' pension checks (18 U.S.C. §495), and uttering those checks (18 U.S.C. §495). The elements of the crime of false statements are different from those required for conviction of forgery and uttering. Thus, appellant's acquittal on the charges involving 18 U.S.C. §1001 (false statements) is not inconsistent with the guilty verdict rendered on the remaining counts. See also, e.g., Dunn v. United States, 284 U.S. 390 (1932); United States v. Zane, 495 F.2d 693, 690 (2d Cir.), cert. denied, 419 U.S. 895 (1974).

C. Newly Discovered Evidence

After trial, appellant received a copy of Herman Leibler's "rap sheet," which indicated that in 1946 and 1950 Leibler had been convicted of grand larceny. Appellant argued that this newly-discovered evidence might have affected the jury's verdict. However, since these convictions were more than 10 years old, it was unlikely that they would have been admitted in evidence. Rule 609(b), Federal Rules of Evidence. In any event, the jurors acquitted appellant of the count involving Leibler's testimony.

CONCLUSION

For the above reasons, there are no non-frivolous issues to be raised on appeal for this Court's review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 1 , 1978

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Hilberman

